They are most certainly important considerations in construing the Act to determine the validity of the appointment in issue. Putting the matter in another way and applying not a literal but a purposive which on recent autnority (*United Hokkien Cemetries, Penang* v. *Majlis Perbandaran, Pulau Pinang*[18] (at page 123) *et alia*) is the correct approach to the construction of the provisions of section 10(7) of the Act, that subsection is meant to provide for a solution and an arbiter to resolve any impasse that may arise as a result of a disagreement between the President and the other Councillors, and if that can be achieved in the event of the appointment of the Menteri Besar as President of the Council in the manner I have discussed, then it follows that as its purpose would be attained the appointment would not necessarily be prohibited under the Act.

The two provisions in the Act, namely, sections 10(7) and 165(1), relied on by the plaintiff as vitiating the appointment of the Menteri Besar as President of the Council must be read in the context of the Act as a whole. I cannot see that these two provisions result in a legislative intent calling for an intractable construction of the Act with that rigour and stringency invariably associated with Draco the Greek, archon of Athens, so as to necessarily and wholly preclude and vitiate the appointment of the Menteri Besar as President of the Council. It might perhaps be said on the one hand that such an appointment is undesirable and on the other that it is politically expedient, for in politics, as in life, the choice is often not between good and evil but between the lesser of two evils. These matters are not, however, the concern of the court and it is not my province to determine, speculate or reflect on the desirability or expediency of any such appointment; I am only concerned with its legal validity and permissibility in the light of the provisions of the Act as a whole. The court's power to make declaratory judgments is confined to matters justiciable in the courts, and the binding declarations which it can make under Order 15 rule 16 of the Rules of the High Court, 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters (*Malone* v. *Metropolitan Police Commissioner*[19] (at page 353)).

I can see no impediment to such an appointment as this case involves in view of the several courses I have referred to which are open for the resolution of any difficulty presented in the event of any differences or disagreement between the President of the Council and the other Councillors. The appointment in this case does not, therefore, in my view, make illusory the provisions of the Act which the plaintiff relies on and the situation thereby created cannot be said to bear any similitude to that of the smile on the cat in Alice in Wonderland which was visible even after the cat itself was not. The effect of the two provisions in the Act which provide the basis for the plaintiff's case is not to present a stark choice of alternatives between the validity and legal permissibility *vel non* of the appointment of the Menteri Besar as President of the Council but there is as I have discoursed a spectrum of possible solutions to meet the situation in such a case. I would, of course, and I need perhaps hardly say this, expect the Menteri Besar not to take part in any deliberations and decisions of the State Authority in the exercise of its powers and functions under sections 9 and 165(1) of the Act in a situation analogous to that contemplated in Article XVI(8) of the First Part of the Laws of the Constitution of Perak ('the State Constitution') in view of his interest in the matter by virtue of his biformity of status, and would refer in passing in this connection to the provisions of section 41 of the Interpretation and General Clauses Ordinance and Article XXI of the State Constitution.

The result.

The appointment in this case which the plaintiff seeks to confute is therefore on a proper construction of the Act as a whole not an incompetent and futile feat of extrapolation by the State Authority by an impermissible extension of the essential requirements of the Act transgressing its provisions as he contends. It is accordingly my firm and considered judgment that the Act does not preclude the appointment of the Menteri Besar as President of the Council, and that his appointment as such is lawful and valid.

For the reasons I have given, *cadit quaestio*. The declarations the plaintiff seeks cannot therefore go, his claim fails and must stand dismissed. I will hear counsel on the matter of costs.

Claim dismissed.

Solicitors: *Karpal Singh & Co.; Kean Chye & Sivalingam.*

PUBLIC PROSECUTOR v. SAI & ORS.

[A.Cr.J. (Salleh Abas F.J.) September 11, 1979]
[Kuala Trengganu — Criminal Appeal No. 32 of 1978]

Criminal Law and Procedure — Charge of operating fishing appliances without licence — Fishing appliances — Forfeiture of vessel — Whether vessel used in the commission of offence — Fisheries (Maritime) Regulations 1967, regs. 2(b), 3(a) & 3(b) — Fisheries Act, 1963, s. 15(1).

Fisheries — Operating fishing appliances without licence — Forfeiture of vessel — Fisheries (Maritime) Regulations, 1967, regs. 2(b), 3(a) & 3(b).

In this case the respondents were charged for operating fishing appliances without licences within Malaysian territorial waters, an offence under Regulation 3(a) of the Fisheries (Maritime) Regulations, 1967. The learned Magistrate convicted the respondents of having fishing appliances on board a vessel, an offence contrary to Regulation 3(b) of the Regulations. He sentenced each of them to six month's imprisonment and ordered forfeiture of exhibits found on vessel, but he ordered the release of the vessel. The Public Prosecutor appealed.

Held: (1) in view of the large quantities of fish, fishing nets and other appliances on board the vessel coupled with the condition of the deck and the admission of the first respondent that he had been fishing, the finding of the learned Magistrate was clearly against the weight of the evidence. The conviction of the respondents should be altered to one of operating fishing appliances without a licence under Regulation 3(a) as originally charged;

(2) as the vessel was used in the commission of the offence, an order of forfeiture of the vessel should have been made. The order of forfeiture should have been made even if the learned Magistrate was satisfied that the offence proved was an offence of possession of fishing appliances without a permit.

Cases referred to:-

(1) *Public Prosecutor* v. *Bujang bin Ali & Ors.* [1978] 1 M.L.J. 224.

(2) *Public Prosecutor* v. *Ismail bin Yusof* [1979] 2 M.L.J. 119.

(3) *Public Prosecutor* v. *Lee Chin Chai* [1974] 2 M.L.J. 174.

CRIMINAL APPEAL.

Mohamed Apandi bin Ali (Deputy Public Prosecutor) for the appellant.

Dato H.L. Wrigglesworth for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: In this case the respondents are 19 Thai fishermen who are the taikong and crew members of their vessel, the "Kittiphon". They were tried by Besut Magistrate on a charge of operating fishing appliances without licences within Malaysian territorial waters, which is an offence contrary to Regulation 3(a) of the Fisheries (Maritime) Regulations, 1967, (P.U. 49) and punishable under section 11 of the Fisheries Act (Revised Act 210). At the end of the case for the prosecution, the learned Magistrate held that there was a *prima facie* case against all the respondents and therefore called upon them to answer the charge. After hearing the evidence led by the defence, the learned Magistrate said that he had some doubt whether the respondents "were caught fishing or found operating fishing appliances within Malaysian waters" and therefore convicted all the respondents of an offence of having in possession on board their vessel the "Kittiphon" fishing appliances which is an offence contrary to Regulation 3(b) of the same Regulations and consequently sentenced each one of them to six months' imprisonment. He ordered the release of the vessel to the owner, but a forfeiture order was made in respect of all other exhibits found on board the said vessel. The Public Prosecutor being dissatisfied with the finding and order of the learned Magistrate, therefore, appealed against the decision of the learned Magistrate.

The facts of the case are as follows. On April, 6, 1978, there was a combined naval and police operation, code-named Seahorse I, for the purpose of preventing illegal trawling within Malaysian territorial waters. One of the Royal Malaysian Naval boats taking part in the operation was K.D. Pari under the command of Major Laut Mui Yoke Loong (PW1). Among the staff members of K.D. Pari were Captain Gunasegeran as the Executive Officer, Lt. Gregory Au Beng Kiat as Navigating Officer (PW2), Razali bin Haji Abdullah as Chief Petty Officer (PW6) and Samah bin Doyah as Leading Seaman (PW7). On April 7, 1978, at 10.00 a.m. whilst K.D. Pari was within Pulau Perhentian waters, PW1 together with Captain Gunasegaran and PW2 sighted about 15 Thai trawlers off Pulau Perhentian. At that time K.D. Pari was between Pulau Perhentian and the trawlers in the northeasterly direction. Of these 15 trawlers, there were three trawlers nearest to K.D. Pari. Following an instruction given by PW1, PW2, fixed the positions of K.D. Pari and the three nearest trawlers and it was then found that K.D. Pari was 4½ miles north-east of Pulau Perhentian whilst the three nearest trawlers were 4 miles further north-east of K.D. Pari. In other words, the three nearest trawlers at 10.18 a.m. were 8½ miles away north-east of Pulau Perhentian. At that time, according to PW1 who was watching the activities of these trawlers through binoculars, the trawlers were trawling. PW6, the Chief Petty Officer of K.D. Pari who also saw the trawlers through binoculars, said "the crew were busy in taking out the nets from the sea. They were recovering the nets". PW1 then instructed his men to proceed to the nearest three trawlers. So the first trawler named "Sivirat" was boarded at 10.28 a.m. by Captain Gunasegaran, the second trawler "Perapat" was boarded at 10.50 a.m. by PW2, the Navigating Officer. After these two trawlers were boarded and the boarding parties were left on board the Sivirat and the Parapat, K.D. Pari still under the command of PW1 proceeded to arrest the third trawler, the "Kittiphon". This trawler was boarded at 10.57 a.m. by PW6, the Chief Petty Officer. At the time of the boarding, the position of the Kittiphon as fixed by K.D. Pari's Leading Seaman, Samah bin Yahya (PW7), was 11 miles north-east of Pulau Perhentian. At the time of the arrest, according to PW1, the deck of the Kittiphon was wet and there were about 25 piculs of fish mixed with ice and there were fishing nets and other fishing appliances on board. The 19 respondents who were the Taikong and crew of the Kittiphon were all arrested and together with their vessel were taken to Pulau Perhentian, and on the next day they were taken to Kuala Trengganu where they were handed over to Police authority. The police report of the incident was lodged by PW1 at Kuala Trengganu on April 7, 1978, at 4.00 p.m. (Kampong Raja Report 149/78).

The respondents in their defence did not deny that they had been fishing but instead disputed that they were doing so in Malaysian territorial waters. DW1, the Taikong of the Kittiphon whose evidence appeared to be somewhat incoherent, said that the Kittiphon was neither fishing nor was she in Malaysian territorial waters at the time when she was intercepted by K.D. Pari. He, however, admitted on April 7, 1978, about 9.45 a.m. Thai time, i.e. 10.15 a.m. Malaysian time, he was fishing outside Malaysian territorial waters about 24 miles away from Pulau Perhentian. He saw K.D. Pari intercepting other Thai trawling boats and on seeing this, he proceeded to sea, but after intercepting other vessels, K.D. Pari turned its attention to his vessel the Kittiphon. In the cross-examination, he admitted seeing other Thai vessels trawling around his boat about 4 miles away.

In my view, the issues involved in this case are two-fold, i.e. whether at the material time the Kittiphon was in Malaysian territorial waters and, if so, whether she was or had been engaged in fishing activities. If so, the offence of operating fishing appliances without a licence under Regulation 3(a) is proved.

As to the first point, the learned Magistrate found as a fact that all the 19 respondents and their vessel, the Kittiphon, were within Malaysian territorial waters when intercepted by K.D. Pari. Counsel for the respondents, Dato' Wrigglesworth, made a strong attack on the finding of the learned Magistrate on this issue as being untenable on a number of grounds.

He first submitted that since no evidence was adduced to show that the Kittiphon was amongst the 15 Thai vessels first sighted by officers of K.D. Pari,

the Kittiphon could not have been within Malaysian territorial waters at the time of sighting and therefore could not have been fishing there. To my mind, this is a farfetched submission. If the Kittiphon were not one of those Thai vessels, how could she be arrested? How did she suddenly appear on the scene? In any case, the prosecution evidence was that, of the three Thai vessels nearest to K.D. Pari and subsequently arrested by her, the Kittiphon was one of them. Therefore, it is clear that the Kittiphon was within Malaysian territorial waters when she was first seen and later arrested.

Dato' Wrigglesworth next submitted that the chart P1 which was used by officers of K.D. Pari to fix the position of the boats was not proved by the prosecution to be an accurate chart having regard to *Public Prosecutor* v. *Bujang bin Ali & Ors.*,[1] and therefore the Kittiphon could not have been within Malaysian territorial waters. In reply to this submission, it is sufficient to state that the prosecution in this case did not solely rely upon the chart P1 in fixing the position of the vessels, but also on radar and compass which were proved to have been in tip top condition. The learned Magistrate in his grounds of judgment said:

"First looking at the evidence of PW1 and PW2, I have no doubt that the radar and compass on K.D. Pari were in good working order on April 7, 1978 and bearing was correctly taken, i.e. 11 nautical miles from Pulau Perhentian, that is within the Malaysian maritime territorial waters."

Thus, in my view, there is no substance in the counsel's submission.

It was further submitted by Dato' Wrigglesworth that since the journey from the place of arrest to Pulau Perhentian took almost four hours and having regard to the speed of the Kittiphon and the distance between the place of arrest and Pulau Perhentian, the Kittiphon must have been arrested well beyond Malaysian territorial waters. Attractive though this submission appears to be, it cannot however stand in view of the fact that the Kittiphon, after being arrested, was escorted to Pulau Perhentian by K.D. Pari, and on the same day at 4.00 p.m. PW1, the Commander of K.D. Pari, was already at Kuala Trengganu Police Station to lodge a report of the incident. This means that the time taken by K.D. Pari to escort the Kittiphon to Pulau Perhentian was not four hours, but very much less; otherwise K.D. Pari could not have been at Kuala Trengganu by 4.00 p.m. on that day. Granted that PW6 stated that the Kittiphon arrived at Pulau Perhentian between 3 and 4 o'clock on that day, but in view of the evidence of PW1 who lodged a report at Kuala Trengganu at 4.00 p.m. on the same day, PW6's evidence on the arrival time at Pulau Perhentian could not be really accurate. Therefore, in my view, this submission cannot affect the finding of the learned Magistrate which is based on the clear evidence of witnesses, especially PW2 and PW7, as to the position of the Kittiphon at the time of sighting and arrest.

Finally, it was submitted that the overzealousness of the Royal Malaysian Naval officers participating in the combined operation might have led them to arrest this foreign fishing vessel outside Malaysian territorial waters. As to this submission, there is not an iota of evidence to support it. I do not think it is worth considering.

In my judgment, there is nothing unreasonable about the finding of the learned Magistrate as to the whereabouts of the Kittiphon at the time of sighting and arrest at it is fully supported by the evidence of the staff members of K.D. Pari, namely PW1, the Commanding Officer; PW2, the Navigating Officer; PW6, the Chief Petty Officer; and PW7, the Leading Seaman. It is true that at the time of the interception, PW2 was no longer on board the K.D. Pari as he had boarded the Parapat, the second Thai trawler, but his evidence is important in that before any of these three trawlers were arrested, he was the one who fixed the position of the three nearest Thai trawling boats, one of which turned out to be the Kittiphon. Dato' Wrigglesworth attacked the evidence of PW2 and PW7 as being unworthy of belief. However, the learned Magistrate accepted their evidence. In my view, there is nothing in their evidence which will entitle the learned Magistrate to reject or suspect their testimony.

As regards the second issue, i.e. whether the Kittiphon was fishing, the learned Magistrate in his grounds of judgment gave two reasons why he did not hold that the respondents were fishing, but instead, convicted them of an offence under Regulation 3(b). His first reason was that —

"PW6 informed the court that he saw the Kittiphon moving towards the open sea. How could this happen, while moving away they were trawling. He did not elaborate."

This finding is, however, not correct and in fact contrary to what PW6 said in his evidence, which is as follows:—

"Then I went to 'anjongan'. I sighted a few Thai trawler-boats. Eight miles from shore. (I was told by navigating officer.) My Commanding Officer instructed me to give chase to the nearest Siamese boats. There were (Thai boats) heading towards the sea from inland."

It is to be noted that PW6 never said that he saw the Kittiphon moving away to the sea. What he saw was a number of Thai trawler boats without identifying their names. This witness continued his evidence and said:—

"I used binoculars to identify (watch) the Thai boats — the crew were busy in taking out the nets from the sea. They were recovering the nets."

This piece of evidence must have referred to the time when the group of Thai trawler boats were first seen. The effect of the evidence of PW6 is that when the Thai boats were first seen, they were moving towards the sea and their crew were recovering the nets. Surely the act of recovering the nets is part of the process of operating a fishing appliance, i.e. part of fishing activities. This evidence as to the crew being seen recovering the nets remains unshaken.

The second reason given by the learned Magistrate for not convicting the respondents of an offence under Regulation 3(a) was as follows:—

"According to PW2, when K.D. Pari came alongside the Kittiphon, the Kittiphon crew were in the process of recovering the net and five to ten minutes later he escorted the boat to Pulau Perhentian."

The learned Magistrate held that this evidence is in contradiction with the evidence of the expert, PW8, who said that the process of recovering the nets would take at least fifteen minutes. The difference in the time of recovering the nets given by PW2 and PW8,

according to the learned Magistrate, gave rise to a doubt whether the Kittiphon was fishing. At the outset it must be observed here that the learned Magistrates' reasoning is completely off the tangent and unsupported by evidence. It is clear that at the time of the arrest the Kittiphon was not, and had ceased, fishing. The nets were on board, the deck was wet and fish were found on board (PW1 and PW6). Further, the learned Magistrate was wrong in saying that PW2 was in K.D. Pari when she came alongside the Kittiphon. PW2 was not there when the Kittiphon was boarded as by then he was already on board the second of the three Thai trawlers which were arrested earlier. The officer who boarded the Kittiphon was PW6, the Chief Petty Officer, but this officer never said that when K.D. Pari came alongside the Kittiphon the crew were in the process of recovering nets. There is, therefore, a complete confusion and misappreciation of the evidence on the part of the learned Magistrate. What PW6 said was in effect that when he first saw the Thai boats the crew were busy taking out nets from the sea and this was the position at about 10.18 a.m. So at 10.57 a.m. when the Kittiphon was arrested, about 30 to 40 minutes later, the inference is that the nets which according to expert evidence could be recovered in at least 15 minutes must have been fully recovered and already placed on board, and the Kittiphon was then no longer and had ceased fishing. This is fully borne out by the evidence of PW1 and PW6 who stated in evidence that the deck was wet, the nets and fish were on board on the Kittiphon. This shows that the Kittiphon had been fishing. The fact that at the time of the arrest the Kittiphon ceased to be fishing does not absolve the respondents from the offence so charged when there is evidence to show that they had been fishing before then. The time given in the charge was that they were fishing at about 11.00 a.m. As the time given is only an approximate time, in my view it does not detract them from being otherwise guilty of the offence as charged.

In calling upon the respondents to answer the charge under Regulation 3(a) at the end of the Prosecution case, the learned Magistrate must have accepted the evidence of PW1 and PW6 to the effect that before the interception of three nearest Thai trawler boats of which the Kittiphon was one, their crew were engaged in fishing operations. Their evidence that the boats were moving slowly and their crew were recovering the nets is consistent with the evidence of expert witness PW8 when he said that the boat moves slowly when nets are laid or recovered. The defence did not deny that the respondents were fishing, but only disputed as to the locality of their fishing and accused the R.M.N. officers of lying for saying that they were fishing within Malaysian territorial waters. There is, however, no rhyme nor reason why these officers who are complete strangers to the respondents should lie or would want to lie against them. In view of the finding of large quantities of fish, fishing nets and other appliances on board the Kittiphon, coupled with the condition of the deck, i.e. being wet at the time of interception and the admission of DW1, the Taikong, that he had been fishing, I agree with the submission of the learned Deputy Public Prosecutor that the finding of the learned Magistrate is clearly against the weight of evidence. Hence, I allow the appeal and alter the conviction of the respondents to one of operating fishing appliances without a licence under Regulation 3(a) as originally charged and tried. I also order that the vessel, the Kittiphon, be forfeited under section 14(1) of the Fisheries Act (Revised Act 210).

At the root of this appeal lies the fate of the Kittiphon: whether to be released or to be forfeited. Encik Apandi who appeared for the Public Prosecutor submitted that even if the learned Magistrate was right in convicting the respondents of an offence under Regulation 3(b), the order of forfeiture of the Kittiphon is mandatory and therefore should have been made. He cited the recent decision of the Federal Court in *Public Prosecutor* v. *Ismail bin Yusof*,[2] to support his argument. In reply to this submission, Dato' Wrigglesworth submitted that *Public Prosecutor* v. *Ismail bin Yusof* deals with a different set of Regulations, i.e. Fisheries (Prohibition of Method of Fishing) Regulations, 1971, and as such does not apply to an offence under Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967. He contended that for the latter offence, the earlier decision of the Federal Court in *Public Prosecutor* v. *Lee Chin Chai*[3] still applies. He further argued that in any case Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, is *ultra vires* the Act.

Since the Public Prosecutor has succeeded in his appeal in that the respondents are guilty of the offence under Regulation 3(a), strictly speaking, there is no need for me to deal with these alternative arguments; but in view of the importance of points raised therein, I shall deal with the them as best as I could.

Firstly, I deal with the vires of Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967. Under section 2 of the Fisheries Act, the Minister is given power to make regulations relating to maritime and estuarine fishing and fisheries under 16 different paragraphs, one of which is paragraph (b), as follows:—

"(b) to regulate or prohibit... the possession in a vessel of traps or fishing nets...."

Pursuant to section 2 of the Act, Fisheries (Maritime) Regulations, 1967, was made and came into force on January 26, 1967 (P.U. 49/1967). Regulation 3 as amended by P.U. 387/67 on July 27, 1967, has three paragraphs, of which only paragraph (b) is relevant here. For our purpose, paragraph (b) of Regulation 3 is referred to as Regulation 3(b), which is as follows:—

"No person shall have in his possession on board a vessel any *fishing appliances* or any part thereof."

"*Fishing appliances*" are defined by Regulation 2 to include "fishing nets, fishing traps, hooks and lines with more than three hooks used with or without floats or buoys specially designed for fishing...." According to Dato' Wrigglesworth, since the Minister is empowered to make regulations to prohibit the possession of traps and fishing nets only, he has no power to make Regulation 3(b) to prohibit the possession of fishing appliances, because fishing appliances include not only fishing nets and fishing traps, but also hooks and lines with more than three hooks. In my view, the fact that fishing appliances are defined to include hooks

and lines does not make Regulation 3(b) ultra vires, because hooks and lines can be considered as fishing traps. Even nets are traps because the function of any trap is to render the object of catch, i.e. fish, immobile and therefore facilitate the capture by humans.

Even if it is considered that "fishing appliances" are wider than fishing nets and traps by the inclusion within the definition of hooks and lines and so renders Regulation 3(b) inconsistent with section 2(b) of the Act, by virtue of section 23 of the Interpretation Act, 1967, only to the extent of its inconsistency is Regulation 3(b) void. It, therefore, does not affect the prohibition relating to possession of fishing traps and nets. In any case, the inclusion of hooks and lines to be among the prohibited fishing equipment can never be ultra vires because under section 40(2)(a) of the Interpretation Act, 1967, power to make subsidiary legislation to control or regulate any matter includes power to prohibit *acts whereby the control or regulation might be avoided*". It is proper that possession of hooks and lines is prohibited because such possession is an *"act whereby control or regulation might be avoided"* and therefore could be prohibited. Otherwise, Regulation 3(b) would be an anomaly and could be avoided and frustrated. In my view, there is nothing ultra vires about Regulation 3(b) just because "fishing appliances" includes hooks and lines as well over and above fishing nets and traps. Further, Fisheries (Maritime) Regulations, 1967, was not made by the Minister specifically under section 2(b) of the Act but under the whole section 2. The Regulations begin with the following words:—

"In exercise of the powers conferred by section 2 of the Fisheries Act, 1963, the Minister hereby makes the following regulations."

What clearer authority can there be in favour of the validity of the Regulations than section 25 of the Interpretation Act, 1967, which says:—

"Subsidiary legislation shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of any particular power or powers."

Thus if section 2(b) is not wide enough to cover the making of Regulation 3(b), surely the shortfall is fully covered by section 2 of the Act generally, under which the Regulations were made.

Further, under section 2(b) of the Fisheries Act as originally enacted in 1963, there was no mention of power to make regulations to prohibit the possession in a vessel of traps and fishing nets. This section as it was then before the amendment in 1967 by Act 20 of 1967 was that the Minister was given power "to regulate or prohibit any method of fishing or the use of traps or fishing nets." Only after the Act No. 20/67 was passed in 1967 is the power to prohibit possession included. The present section 2(b) is thus read the power "to regulate or prohibit any method of fishing or the *possession* in a vessel of traps or fishing nets or the use of traps or fishing nets in maritime and estuarine waters". The absence of the power to prohibit possession does not mean that the regulation-making authority cannot make regulation to prohibit *possession* of fishing apparatus, because otherwise the object of the section which is to prohibit fishing will be defeated. For this purpose a reference to section 30(2)(a) of the Interpretation and General Clauses Ordinance, 1948, and section 40(2)(a) of the Interpretation Act, 1967, is sufficient to put the matter at rest.

Hence, I cannot see how Regulation 3(b) is *ultra vires* the Act. I therefore reject the submission that it is *ultra vires* the Act and hold that it is clearly *intra vires*.

As to the submission that forfeiture of vessel is not mandatory where the offence proved is under Regulation 3(b), Dato' Wrigglesworth cited Federal Court decision given on October 4, 1974, in *Public Prosecutor* v. *Lee Chin Chai*. But this judgment was reviewed by the Federal Court on February 13, 1979 in the recent case of *Public Prosecutor* v. *Ismail bin Yusof* and admitted by the court to be an error — a polite way of saying that the case is overruled. The Lord President delivering the judgment of the Federal Court said that the court was "in error in *Public Prosecutor* v. *Lee Chin Chai*" and held that "the use of a vessel is an essential ingredient of an offence of possession of fishing appliances without a licence and so if you commit this offence, the vessel is necessarily used in the commission of the offence" and hence hold that a forfeiture order is mandatory.

The question of release and forfeiture of the vessel according to section 15(1) is not made to depend upon whether an accused is guilty under a particular set of regulations, as claimed by Dato' Wrigglesworth, so that where he is convicted under Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, the boat cannot be forfeited, but would be so forfeited only if he is convicted of an offence under the Fisheries (Prohibition of Method of Fishing) Regulations, 1971. There is no foundation for such submission. Whether or not a forfeiture order is to be made depends entirely upon the fulfilment of conditions laid in section 15(1) of the Act. This section says:—

"15. (1) An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held and an order for the forfeiture of such thing shall be made if it is proved to the satisfaction of the court that —

(a) the offence committed is for —

(i) using any net, instrument, fishing material or appliance which is prohibited by or under this Act or any regulation or rules made thereunder; or

(ii) doing or carrying on an act without a licence or permit required under this Act or any regulations or rules made thereunder ; and

(b) that thing was the subject matter of or was used in the commission of the offence notwithstanding that no person may have been convicted of such offence."

It is observed that this section lays down two rules. The first rule is that the court before which the relevant prosecution is held has to make an order of release or forfeiture of the vessel seized. The second rule is that the court must make an order of forfeiture where the following conditions are fulfilled:—

(1) the subject-matter of forfeiture, i.e. the vessel, must be "anything liable to forfeiture under this Act";

(2) (a) the offence proved is one of using nets, instrument, fishing appliance, which is prohibited by the Act or Regulations or Rules; or

(b) the offence proved is one of doing or carrying

on an act without a licence or permit required under the Act or Regulations or Rules; and

(3) the subject-matter of the forfeiture was used in the commission of the offence.

As regards condition (1), only anything liable to forfeiture can be forfeited. What is "*anything liable to forfeiture*"? The answer is found in section 14(3) of the Act which says that "all things liable to seizure under this section including the proceeds of sale under subsection (2) shall be liable to forfeiture". So "*anything liable to forfeiture*" is really the same as "*anything liable to seizure*" and this in turn by section (1) means "all vessels, etc. seized" by any Fishery Officer or any police officer not below the rank of Corporal, being the vessels, etc. in respect of which such officer has reason to believe that an offence has been committed contrary to the Act or Regulations or Rules. As to the liability of the Kittiphon to seizure, it is clearly established beyond doubt. It is in respect of the Kittiphon on board of which the respondents were found to be in possession of fishing appliances without a permit, that an offence under Regulation 3(b) is committed. Further, the Kittiphon was intercepted by K.D. Pari officers and later handed over to Police Officers, PW3, PW4 and PW5, in whose custody the vessel has been ever since. Therefore condition (1) is fully satisfied.

As regards condition (2), all that is necessary is to fulfil either condition 2(a) or 2(b). Since the alternative argument is based on conviction under Regulation 3(b), only condition 2(b) is relevant here. The prosecution must show that the offence proved is "*the doing or carrying on an act without a licence*" referred to under the Act or the Regulations. It is clear beyond doubt that condition 2(b) is fulfilled because Regulation 3(b) requires a licence for any one to have in possession on board fishing nets or appliances. The act of possessing these appliances on board is prohibited as it amounts to "*doing or carrying on an act without a licence*" within the meaning of section 15(1)(a)(ii). For this reason, it makes no difference whether the offence proved is one of operating fishing appliances without a licence under Regulation 3(a), or having on board such appliances without a licence under Regulation 3(b). Both or either offence if committed fulfils condition (2) for the purpose of a forfeiture order.

As to condition (3), i.e. the Kittiphon being used in the commission of the offence, I wholeheartedly agree with and support the view of the Federal Court in *Public Prosecutor* v. *Ismail bin Yusof* in treating the vessel as part of ingredient of the offence of possession of fishing appliances without a licence. I say no more than to quote the words of the Lord President, as follows:—

> "Because of the words underlined, in our view, you do not require a licence to possess a fishing appliance in a shop, house, a car or on the beach. You require one only if it is on board a vessel used for fishing like the one in that case. Thus the use of a vessel is an essential ingredient of the offence of possession of a fishing appliance without a licence and so if you commit this offence, the vessel is necessarily used in the commission of the offence."

That being the case, I hold that the learned Deputy Public Prosecutor is correct in his alternative submission, in that even if the Magistrate was satisfied that the offence proved was an offence of possession of fishing appliances without a licence or permit under Regulation 3(b), he is bound to make an order of forfeiture of the Kittiphon because all the three conditions I enumerated early are fully satisfied. The Kittiphon was a thing liable to forfeiture. The offence in respect of the Kittiphon is one of doing an act, i.e. having in possession on board fishing appliances without permit, and the Kittiphon is used in the commission of the offence.

Finally I allow the appeal, and alter the conviction of the respondents to one under Regulation 3(a) and order that the Kittiphon be forfeited.

Appeal allowed.

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